THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION No.23255 OF 2006

DATED 15TH DECEMBER, 2006

Between

Padma

... Petitioner

AND

The Government of Andhra Pradesh, rep.by its Principal Secretary, Irrigation Department, Secretariat, Saifabad, Hyderabad and others.

... Respondents

THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION No.23255 OF 2006

ORDER:

There are 115 petitioners in this case. They allege that all of them are in occupation of small extents of lands comprised in survey Nos.66/5, 66/6 and 66/7 of Mansurabad village in Saroornagar Mandal. They allegedly erected thatched huts about 20 to 25 years ago and according to them there are 350 families living in the area known as Adivasi Nagar (Balaji Nagar), Saroornagar Mandal. Second respondent conducted socio-economic survey and identified the petitioners for being allotted house sites. They also allege that they obtained ration cards from the Department of Civil Supplies, water supply from Municipal Authorities and their request for providing street lights and drainage connections is under consideration. On 01.12.2005, some persons tried to evict the petitioners and the petitioners were beaten. A police complaint was lodged with sixth respondent but the same was not registered and on 04.12.2005 complainants were detained by sixth respondent. Thereafter, a representation was made to the District Collector on 19.09.2005, in vain. The petitioners contend that the State is bound under Articles 38, 46 and 47 of Constitution of India to provide shelter, which is a guaranteed right under Article 21 of Constitution of India. They, therefore, seek a writ of Mandamus declaring the action of the respondents in not allotting the land admeasuring Acs.8.00 in survey

Nos.66/5, 66/6 and 66/7 of Mansurabad village as illegal and arbitrary and violative of fundamental rights under Constitution of India. They also seek a consequential direction to respondents to allot the said lands to the petitioners with all civic amenities.

The writ petition is opposed by learned Assistant Government Pleader for Revenue (T) as well as learned standing counsel for Municipalities. At the stage of Admission itself, they submitted that the land forms part of an approved layout and earmarked as park/common place and that when the petitioners tried to encroach upon the land, they were prevented. Therefore, this Court directed the learned standing counsel to file a counter affidavit. Accordingly, a counter affidavit is filed before this Court on 13.12.2006.

The Commissioner of L.B.Nagar Municipality, second respondent herein, filed a counter affidavit opposing the writ petition. The case projected in the counter affidavit is as follows. Gram Panchayat, Mansurabad, approved a layout for the land in survey Nos.66/5, 66/6 and 66/7. At three (3) places, open land was earmarked for public purpose and one of them admeasuring 566 square yards was earmarked for purpose of park. The park land was encroached upon by about 100 persons, who raised the huts five years ago. On 30.09.2004, Balaji Nagar Welfare Association gave a complaint about unauthorised occupation of park land. In response thereto, action was initiated by the Municipality and Police, and second respondent removed all the huts from the park land on 18.11.2004 with the help of officials of Police and Revenue Department. When the engineering wing of the Municipality made attempts to erect fencing around the encroached land, the encroachers did not allow the fencing to be raised. Even after removing the encroachments, some of them again tried to encroach upon the land and therefore, police are regularly guarding the area. The second respondent addressed a letter, dated 28.11.2005 to fifth respondent requesting for survey of the area. In the meanwhile, when some of the persons tried to encroach the land, the Municipal authorities tried to remove the same.

Dealing with the claim of the petitioners for a shelter, second respondent in paragraph 10 of the counter affidavit made the following averments.

> It is respectfully submitted that to assess the financial status of all the communicates of the society, the Government shall conduct the socio-economic survey. Basing on this survey, steps will be taken to strengthen the weaker section by providing the support for which they are eligible. It does not mean that by conducting the surveys, providing water supply and other facilities, the encroaches are

> to be accommodated there itself in the open space earmarked for public purposes. They shall be provided with shelter under some other schemes at the placed where the Government is planning to do depending upon their eligibility. The open space in which they have erected temporary sheds is earmarked for public purposes, is vested with Municipality/Government. The respondent Municipality has to protect these land and the same should be kept for the welfare of the surrounding habitations.

After receiving the counter affidavit, learned counsel for the petitioner has not filed any reply affidavit. Therefore, a reasonable inference can be drawn about the existence of two important circumstances. The petitioners indeed encroached upon the land admeasuring 560 square yards in the layout of Balaji Nagar and on a complaint of the residents of said colony, the Municipal authorities removed the encroachments on 18.11.2004 with the help of Police. This stands unrebutted. Secondly, the open land in the layout is earmarked as a park, and therefore, no construction or the use of the land for a purpose other than park is impermissible in law. This is well settled.

It is now well settled that having regard to the provisions of Article 48-A of the Constitution of India, the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country. After Article 48-A was introduced by the Constitution (42nd Amendment) Act, 1976, there has been sudden spurt of litigation by well meaning social activists to protect quality of life in urban areas and a movement for protecting parks and ground areas is on increase. Indeed, it augurs well for the community at large.

In **Virender Gaur v State of Haryana**[1], Government of Haryana permitted the Municipality in Haryana to lease out open space to Punjab Samaj Sabha (PSS) for construction of Dharmashala. PSS was required to pay the lease amount to the Municipality. The land, which was ordered to be demised to PSS, was meant as a public amenity to the residents of the locality to maintain ecology, sanitation, recreation, play ground and ventilation purposes. Though the land stood vested in the Municipality, the Government ordered the grant of lease for purpose of construction of Dharmashala. Residents of the locality approached the Punjab and Haryana High Court challenging the order of the Government unsuccessfully. On High Court declining to interfere, the respondents carried the matter to the Supreme Court. For the lessee, it was contended that under the

Municipalities Act, it was permissible for the Municipality to lease out the land for charitable purpose, and, therefore, leasing out of open space in the lay out is within the powers of the Municipality. The Supreme Court after referring to the Stockholm Declaration on Human Environment, 1972 and Article 48-A, while quashing the orders issued by the Government and ordering to pull down all the constructions made by Punjab Samaj Sabha and also directing the filing of the report by the Municipality, observed thus:

> The word 'environment' is of broad spectrum which brings within its ambit "hygienic atmosphere and ecological balance". It is, therefore, not only the duty of the State but also the duty of every citizen to maintain hygienic environment. The State, in particular, has duty in that behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic environment. Article 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air, water, pollution, etc. should be regarded as amounting to violation of Article 21. Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a humane and healthy environment. **Environmental protection, therefore, has now become a matter of grave concern for human existence. Promoting environmental protection implies maintenance of the environment as a whole comprising the man-made and the natural environment. Therefore, there is a constitutional imperative on the State Government and the municipalities, not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect and improve both the man-made and the natural environment.**"
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> (Emphasis supplied)

The Supreme Court while referring to **Bangalore Medical Trust v B.S.Muddappa**[2] made the following observation:

> The land having been taken from the citizens for a public purpose, the Municipality is required to use the land for the protection or preservation of hygienic conditions of the local residents in particular and the people in general and not for any other purpose. Equally, acceptance of the argument of Shri V.C.Mahajan encourages pre-emptive action and conduct, deliberately chartered out to frustrate the proceedings and to make the result fait accompli. We are

unable to accept the argument of fait accompli on the touchstone of prospective operation of our order.

In **M.I.Builders Private Limited v Radhey Shyam Sahu**[3], Lucknow Nagar Mahapalika constructed underground shopping complex in a historic park known as Jhandewala Park situated at Aminabad Market, Lucknow. The same was challenged before the Lucknow Bench of Allahabad High Court, which held that the decision of Lucknow Municipality is illegal, arbitrary and unconstitutional. As M.I.Builders Pvt., Ltd., which was entrusted with the work of construction of shopping complex had completed part of construction, it sought Special Leave and preferred Civil Appeal before the Supreme Court. The Supreme Court affirmed the view of Lucknow Bench of Allahabad High Court and also directed to dismantle and demolish all the constructions made in the public park and also restore the place as a park to its original shape. The apex Court observed as under.

> …As said earlier, High Court rightly exercised its power of judicial review in the present case. It has examined the manner in which the decision was made by the Mahapalika. Second principle laid in Tata Cellular's case (1994) 6 SCC 631: (1994 AIR SCW 3344: AIR 1996 SC 11) applies in all respects. High Court held that **the maintenance of the park because of its historical importance and environmental necessity was in itself a public purpose and, therefore, the construction of an underground market in the garb of decongesting the area was wholly contrary and prejudicial to the public purpose. By allowing the construction Mahapalika had deprived its residents as also others of the quality of life to which they were entitled to under the Constitution and the Act.** The agreement smacks of arbitrariness, unfairness and favouritism. The agreement was opposed to public policy. It was not in public interest. Whole process of law was subverted to benefit the builder. We agree with the findings and conclusions of the High Court.
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> (Emphasis supplied)

In **Co-operative Housing Society, Saleemnagar Limited v MCH**[4]**,** a Division Bench of this Court, to which I was a Member, considered the question whether construction of a school building in the area earmarked for park at the behest of the Hyderabad Municipal Corporation is justified. The building permission granted by the Municipal Corporation of Hyderabad to a minority educational institution for construction of building was subject matter of the writ petition before the Division Bench. This Court referred to **Bangalore**

Medical Trust (supra), **M.I.Builders Pvt. Ltd.** (supra) and also a judgment delivered by me in **NGOs Colony Development Committee v District Collector, Krishna, Machilipatnam**[5] and categorically laid down as under.

> The answer to the said question must be rendered in the negative. Right to clean environment is a part of the fundamental right under Article 21 of the Constitution of India. The land earmarked for park cannot be converted or changed into land for other purposes. If the Corporation had no jurisdiction to grant permission for construction of the building in a park, no amount of consent can validate the invalidity. The order of the Corporation was a nullity. The Corporation being a statutory authority must exercise its jurisdiction within the four corners of the statute. Any action taken beyond the power by Corporation shall be *ultra vires*.

Therefore, a person who is in occupation of park land, irrespective of economic status or poverty, cannot claim a right to shelter to protect the occupation of a park land or a land reserved for purpose other than residential purpose. Therefore, the petitioner cannot claim any right that can be enforced under Article 226 of Constitution of India and a writ of Mandamus that issues from this Court should be in conformity with the law – be it a statute law or precedent law. Any Mandamus, which is not in conformity with the law or tends to compel the public authority to discharge duties in contravention of law cannot be issued.

Lastly, the second respondent in the counter affidavit as extracted hereinabove, has averred that the Government shall provide shelter to the petitioners in other schemes after conducting socio-economic survey, subject to petitioners satisfying the eligibility conditions for assignment of house sites. This would be sufficient redressal for the petitioners. In this writ petition, however, no relief can be granted as prayed.

The writ petition, with the above observations, is dismissed. No costs.

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(V.V.S.RAO,J)

15.12.2006.
pln

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[1] (1995) 2 SCC 577

[2] (1991) 4 SCC 54

[3] AIR 1999 SC 2468

[4] 2001 (5) ALD 663 (DB)

[5] 2001(1) ALD 55